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# The Origins of the European Competition Law Tradition in Fin-de-Siecle Austria

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# The Origins of European Competition Law in Fin-de-Siècle Austria

by DAVID J. GERBER\*

Virtually all European legal systems seek to protect the process of economic competition, and they do so in ways that are often remarkably similar. They tend, for example, to view competition law as a hybrid form of law, displaying features of public as well as private law and liberalism as well as interventionism. Competition law principles are applied primarily by administrative officials, but their application is subject to judicial processes, often of the regular courts. Moreover, their substantive provisions tend to focus on the positive tasks of establishing the conditions for competition and on problems created by private economic power. These similarities reflect a common origin that is little understood, and the success of the original ideas suggests the importance of understanding the sources of their attractiveness, longevity and power.<sup>1</sup>

The central features of this European model of competition law were first articulated in Austria during the last decade of the nineteenth century, and it was there that they first gained widespread acceptance.<sup>2</sup> From Austria these ideas spread to Germany and then to the rest of Europe, and they have profoundly influenced subsequent European perceptions of the process of economic competition and of law's proper role in regulating that process.

That this critical development in European legal thought and practice should have occurred in turn-of-the-century Vienna is not surprising. During this period the Austrian capital was an extraordinarily fertile intellectual milieu that produced important impulses in many areas of art and science.<sup>3</sup> Sigmund Freud was reshaping thought about the human psyche; Gustav Mahler and Arnold Schoenberg were creating new forms of music; Carl Menger and Eugen Böhm-Bauwerk were

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1. Scholars have paid little attention to the origins of this European model of competition law. For two important exceptions, see Grossfeld, *Zur Kartellrechtsdiskussion vor dem Ersten Weltkrieg*, in *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert* 4 (H. Coing and W. Wilhelm eds. 1979) and H. Schulte, *Das Österreichische Kartellrecht vor 1938* (1979).

2. "Competition law" here refers to any legal regime designed to protect the freedom to compete or the process of economic competition.

3. For evocations of the Austrian intellectual milieu during this period, see C. Schorske, *Fin-de-Siècle Vienna* (1980), and A. Janik and S. Toulmin, *Wittgenstein's Vienna* (1973) and *The Viennese Enlightenment* (M. Francis ed. 1985).

developing a fundamentally new approach to economics; and Ludwig Wittgenstein was preparing to chart a new course for philosophy. A new concept of law was thus one of many fundamentally new intellectual impulses to emanate from *fin-de-siècle* Austria.

In this essay I explore the Austrian origins of European competition law in order better to understand the forces that have shaped the subsequent development of these ideas and continue to influence their operation today.<sup>4</sup> Analysis of the origins of these ideas also provides a valuable perspective on current competition law policies. The initial conceptions of competition law were responses to a specific problem, and they were based on historically-conditioned values, perceptions and expectations regarding the economic process, the role of government, the utility and dependability of language and the capacities of legal processes to influence behavior. To the extent that these values and perceptions remain powerful, the legal norms and procedures based on them deserve continued support. To the extent, however, that new knowledge and experience have rendered them invalid or inapplicable, that legal framework requires critical reevaluation.

This reconstruction of the origins of European competition law thinking also may help dispel several widely-held misconceptions. In the United States, the conventional image of European competition law portrays it as a set of pragmatic, non-political, bureaucratically-generated legal regimes that emerged after World War II under the aegis and leadership of the United States and in emulation of U.S. antitrust law. But, as we shall see, this image requires modification. For example, the central ideas of European competition law date from the 1890s; they were understood as a rejection of the U.S. model of antitrust law; and the circumstances under which they evolved were anything but undramatic.

The essay begins with a review of the political and social contexts in which competition law ideas were developed, highlighting the problems and pressures to which intellectuals and politicians were responding in presenting and supporting those ideas. I then turn to the economic experiences that shaped thought about the economy, in general, and about cartels, in particular. This is followed by analysis of the competition law ideas themselves and the responses to them. Finally, I analyze the confluence of factors that spawned Austrian competition law ideas and led to their broad acceptance, and I examine the legacy of the Austrian experience.

## I. Setting the Stage

The conditions that generated competition law ideas in Austria

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4. This article does not attempt to examine the subsequent evolution of these ideas. It is, however, part of a much larger project in which I am exploring the development of competition law ideas in Europe from the nineteenth century until the present.

in the 1890s reflected the central conflicts of late nineteenth century Europe. Industrialization and the spread of democratic ideals had weakened traditional social and political structures and eroded liberalism as the central intellectual paradigm, but those structures resisted collapse, and the values and ideas of liberalism were not easily toppled. In Austria, this central crisis was particularly poignant, because liberalism had there become closely identified with a small, powerful social class caught in the crossfire between traditional social and intellectual structures and the forces of change.

### A. The Institutional Framework

Competition law ideas developed in the Austrian "half" of the Austro-Hungarian Empire, but those developments cannot be understood outside their imperial context. The empire was that of the Habsburgs, an important power in Europe since 1526, that remained an imposing edifice in the 1890s.<sup>5</sup> It still included, in addition to present-day Austria and Hungary, much of what is now Czechoslovakia as well as significant territories in the modern U.S.S.R., Poland, Roumania, Italy and Yugoslavia, and it was an important player in European politics.

The political structure of the empire was exceptionally complex.<sup>6</sup> In 1867, in an attempt to solidify ties between the Austrian and Hungarian portions of the empire, the Habsburg emperor had been made monarch of both Austria and Hungary. These two kingdoms remained separate states for many purposes, each, for example, having its own legislature and conferring its own nationality, but an intricate set of procedures coordinated the policies and activities of the two states in areas such as foreign relations, and many regulations were applicable throughout the empire.

The emperor was the keystone of this edifice. Centuries of tradition had imbued him with symbolic authority that held the empire together.<sup>7</sup> Moreover, in the late nineteenth century the extraordinary reign of Francis Joseph further strengthened this effect. Emperor from 1848 until his death in 1916, he was widely venerated and wielded enormous personal power.

The imperial bureaucracy further cemented this structure.<sup>8</sup> For centuries it had developed and administered detailed regulations in virtually all areas of societal life. The idea that government officials

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5. For general discussion, see R. Kann, *The Habsburg Monarchy: 1526-1918* (1974).

6. See generally *Id.* at 329-42, and A. May, *The Habsburg Monarchy: 1867-1914* 31-45 (1965).

7. "In the late Austrian empire, the imperial office, with its aura of ceremonial formalism, was the only effective focus of civic loyalty." C. Schorske, *supra* note 3, at 21.

8. See generally W. Johnston, *The Austrian Mind* 45-75 (1972).

would guide the extended community of the empire and make most important decisions for its members pervaded society. In the closing years of the nineteenth century, social, ideological and nationalistic disruptions in other areas of national life served only to highlight the bureaucracy's role as a source and symbol of stability and dependability.

The Austrian component of the empire had been a constitutional monarchy since mid-century, but constitutional limits on the monarch's power were often tenuous at best. He continued, for example, to appoint and dismiss ministers and to dissolve the legislature (*Reichsrat*) and he could veto any legislation. He also had authority to enact laws when the *Reichsrat* was not in session.<sup>9</sup>

The legislature was bicameral, and legislation generally had to be approved by both chambers.<sup>10</sup> Neither chamber was, however, particularly representative. Deputies to the lower house were elected by *curiae* or estates, but suffrage extended only to males, and there was a poll tax that in the 1870s effectively restricted participation in the electoral process to the propertied classes and that was only gradually eliminated during the following decades. Members of the upper house were appointed by the emperor, primarily from the landed nobility, but holders of some church and state offices were appointed automatically. A cabinet of ministers appointed by the emperor had extensive power over the legislative process.

## B. Austrian Society: Divisions and Conflicts

This political machinery operated in a society that by the late nineteenth century was deeply divided along national, class and ideological lines, and tensions and conflicts across these lines of demarcation dominated political development during the closing decades of that century.

Nationality provided what became the most fundamental cleavage in Austrian society, and conflicts between nationality groups tended to feed other societal antagonisms. Austria traditionally had been dominated by its German-speaking population, which was concentrated in the territory of modern Austria and in parts of Bohemia.<sup>11</sup> The royal house itself was German, the capital was a German city, the bureaucracy, the upper classes and the educational, religious and military leadership were culturally and linguistically German.

Other national groups within Austria, such as the Czechs, Poles, Moravians and Slovenians had long endured second-class status, but

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9. This power was not quite absolute. For discussion of the limitations, see A. May, *supra* note 6, at 44.

10. See generally A. Kann, *supra* note 5, at 329-42.

11. In 1880, 37 percent of the population of Austria was German-speaking. W. Jenks, *Austria under the Iron Ring* 4 (1965).

by the 1880s they were demanding improvements in this status.<sup>12</sup> Many sought increased political rights in the areas in which they lived and increased recognition of their cultures and their languages. A predictable result of this situation was a growing animosity between the non-Germans—who sought power—and the Austro-Germans—who sought to protect the rights, privileges and benefits they enjoyed.

Class stratification in Austria was exceptionally rigid by Western European standards, with lineage virtually the sole determinant of position within the highest levels of society.<sup>13</sup> The great families of Austria still lived primarily on landed estates and controlled not only social status, but much of the country's wealth as well.<sup>14</sup> While some nobles took an interest in politics, this was an exception, and as a group they were intensely conservative.

A *haute bourgeoisie* consisting of high-ranking bureaucrats, professors, lawyers, doctors and the highest echelons of industry and finance constituted a second well-defined social stratum. In dominating policy-making as well as economic, cultural and intellectual life, this group had extensive power, particularly in Vienna. Moreover, according to Carl Schorske, it was "unique in Europe for its aesthetic cultivation, personal refinement and psychological sensitivity."<sup>15</sup> Liberalism was its credo.<sup>16</sup>

A lower middle class consisting primarily of artisans, shopkeepers and lower civil servants had little in common with the bourgeoisie, and its members seldom acquired access to it. This group played a pivotal role in Austrian society during the late nineteenth century.<sup>17</sup> At mid-century relatively passive, by the 1890s its members had come to distrust and often despise the liberal bourgeoisie that was above them and to fear those below them, and this distrust and fear developed just as the class was enfranchised. This lower middle class provided the electoral substrate for the anti-semitic, anti-big business Christian Socialist party that stormed the Austrian stage in the late 1880s.<sup>18</sup>

At the bottom of the scale were the peasants and agricultural and industrial laborers.<sup>19</sup> Excluded from the classes above them, they became

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12. For discussion of the various national groups, see *Id.* at 1-8.

13. See generally W. Johnston, *supra* note 7, at 39-44.

14. See generally A. May, *supra* note 6, at 158-164.

15. C. Schorske, *supra* note 3, at 298.

16. In the early nineteenth century, "liberals" generally were those who opposed the existing hereditary political structures and sought to achieve greater participation in government and greater freedom of the individual from government. By the latter part of the century, liberalism focused primarily on minimizing state interference in the economy. See generally K. Eder, *Der Liberalismus in Altösterreich* (1955) and G. Franz, *Liberalismus: Die Deutschliberale Bewegung in der Habsburgischen Monarchie* (1955).

17. For discussion, see C. Schorske, *supra* note 3, at 65-8.

18. W. Johnston, *supra* note 8, at 63-6.

19. Compared with most areas of Europe, a large proportion of the agricultural

increasingly aware during the 1880s and 1890s of their disadvantages and of their potential power to force redress of at least some of these disadvantages. In particular, the urban workers came to perceive industrialists and liberals as their exploiters and their natural enemies, and they generally espoused socialist ideologies.

A large Jewish population, particularly in Vienna, added another element to this picture.<sup>20</sup> By the turn of the century Viennese Jews were powerful and often dominant in banking and industry as well as in the professions and the bureaucracy and in cultural and intellectual life.<sup>21</sup> There were also many Jews among the shopkeepers of the cities.<sup>22</sup>

Education and culture represented an additional line of division within Austrian society. The Austro-German upper middle class dominated educational and cultural life in a heavily Catholic country with a tradition of anti-intellectualism.<sup>23</sup> Leadership in this area thus often brought its members less respect than envy and distrust, from both above and below them on the social scale.

### C. The Rise and Fall of Economic Liberalism

Economic experience intertwined with political structures and social forces to generate the values, perceptions and attitudes from which competition law ideas evolved. Images of how the Austrian economy was working and whom it was benefiting or harming defined and sharpened social conflicts and directed the efforts of the politicians, bureaucrats and scholars who sought to understand and/or respond to those conflicts.

The central theme of this experience was the fate of liberalism. The generation that created and accepted the concept of competition law in Austria had contradictory experiences of competition and economic freedom. Nowhere did competition more triumphantly succeed and then more ignominiously fail than in Austria in the second half of the nineteenth century, and, as a result, the idea of competition was first apotheosized and then vilified.

#### 1. *The Austrian Economy*

To understand this development demands a brief look at the

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population was wage-earning rather than independent. In 1900 the figure was 29.5% for Austria proper (modern day Austria) and 36% for Bohemia. I. Berend and G. Ranki, *Economic Development in East-Central Europe in the 19th and 20th Centuries* 48 (1974).

20. See generally, e.g., L. Goldhammer, *Die Juden Wiens* (1927) and Kann, German-speaking Jewry during Austro-Hungary's Constitutional Era (1867-1918), 10 *Jewish Soc. Stud.* 239-56 (1948).

21. See, e.g., H. Matis, *Österreichs Wirtschaft 1848-1913*, 409-10 (1972).

22. For discussion, see C. Schorske, *supra* note 3, at 128-9.

23. G. Franz, *supra* note 16, at 18-9.

Austrian economy in the second half of the nineteenth century. During this period, Austria was still largely agricultural, with more than fifty percent of the population still engaged in agriculture at the end of the century.<sup>24</sup> Large estates owned and operated by noble families controlled agricultural production in most areas,<sup>25</sup> and although agricultural productivity varied significantly according to region, it was generally lower than in Western Europe.

The process of industrialization lagged well behind countries such as England and Germany, and it was unevenly diffused throughout the empire, with most industry concentrated in Bohemia and in the area surrounding Vienna.<sup>26</sup> Austrian industry tended to produce consumer products for markets within the empire, largely because that market was protected by imperial tariffs that were intended to assure that the consumers of the empire would buy Austrian goods rather than the frequently superior manufactured goods emanating from northern and western Europe, primarily from Germany.<sup>27</sup> With this type of domestic tariff protection, Austrian industrial leaders saw little incentive to compete on international markets against the more advanced countries of Western Europe.

Major industries often remained in the hands of families, many of whom were either foreign or Jewish or both.<sup>28</sup> There was comparatively little public distribution of corporate ownership, and Austrian corporate law contributed to this situation by placing more significant restrictions on the use of the corporate form than generally were found in competing countries. For example, Austrian law required government approval to form a stock corporation (until 1899) and a high minimum capital investment.<sup>29</sup>

Due in part to such restrictions, Austrian industry was heavily dependent on bank financing to supply its capital needs.<sup>30</sup> Many of the banks operating in Austria were, again, either foreign or Jewish or both, and those that were not were generally owned by other Austro-

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24. See H. Matis, *supra* note 21, at 28.

25. These estates frequently also engaged in mining, processing and some industrial activities. See Adshead, The Genesis of the Imperial Mind, in *The Viennese Enlightenment* 15, 25-8 (M. Francis ed. 1985).

26. For discussion, see I. Berend and G. Ranki, *supra* note 19, at 112-9.

27. A. Milward and S.B. Saul, *The Development of the Economies of Continental Europe 1850-1914* (1977).

28. See generally I. Berend and G. Ranki, *supra* note 19, at 93-9 and *Id.* at 318.

29. See generally Hofmeister, Die rechtlichen Aspekte der Industrialisierung in der Österreichisch-Ungarischen Monarchie 1873-1918, 24 *Österreichische Osthefte* 271, 279-82 (1982) and D. Good, *The Economic Rise of the Habsburg Monarchy 1750-1914*, 203 (1984).

30. See generally D. Good, *Id.* at 206-18; R. Rudolph, *Banking and Industrialization in Austria-Hungary* 91-121 (1976) and E. März, *Österreichische Industrie- und Bankpolitik in der Zeit Franz Josefs I.* 221-9 (1968).



Germans.<sup>31</sup> By the end of the century, the influence of banks within Austrian industry was very strong,<sup>32</sup> and it was a frequent source of criticism from several political directions.<sup>33</sup>

As a result of the belated and uneven pace of industrialization in Austria, artisans continued to play a major role in some sectors of the economy until after the turn of the century, particularly in the country's less-developed areas.<sup>34</sup> The size and strength of this group increased political resistance to the industrialization process and resentment of the liberals who were associated with that process.

## 2. *The Travails of Liberal Economic Policy*

On gaining political power in the 1860s the liberals reduced significantly most state intervention in the economy,<sup>35</sup> and this move was soon followed by dramatic improvements in economic performance. Despite its recent military defeats, Austria's economy flourished beyond all expectations,<sup>36</sup> and its successes from 1866 through 1873 seemed to prove to all levels of society the wisdom of allowing competition to reign unfettered. The liberals took full credit for the Eldorado that their policies seemed to be producing.<sup>37</sup>

Yet this "Golden Age" lasted less than a decade, ending abruptly in 1873 with a spectacular stock market collapse that led to major bankruptcies, financial ruin for some important families and a sharp rise in unemployment.<sup>38</sup> Although the beginnings of this economic downturn were particularly dramatic in Austria, the 1870s witnessed persistent economic problems throughout Europe, and a period of general economic malaise followed that lasted until 1893.<sup>39</sup> The entire period is generally referred to as the "Great Depression,"<sup>40</sup> although

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31. See R. Rudolph, *Id.* at 174-183.

32. Leading economic historians such as Alexander Gerschenkron have considered this dependence on bank financing to be a controlling characteristic of Austrian capitalism. See generally A. Gerschenkron, *Economic Backwardness in Historical Perspective* 14 (1962).

33. See, e.g., D. Good, *supra* note 29, at 98-9.

34. See generally H. Rosenberg, *Grosse Depression und Bismarckzeit* 237-9 (1967).

35. The process of reform actually began under the neo-absolutist governments in the 1850s. See D. Good, *supra* note 29, at 78-95.

36. For discussion, see H. Matis, *supra* note 21, at 153-259, and Gross, *The Industrial Revolution in the Habsburg Monarchy*, in *The Emergence of Industrial Societies* 228, 261-276 (C. Cipolla ed. 1976).

37. Despite such claims, state intervention in the economic sphere undoubtedly contributed significantly to the economic successes. See generally H. Matis, *supra* note 21, at 37-8.

38. See A. May, *supra* note 6, at 64-7.

39. See Rosenberg, *Political and Social Consequences of the Great Depression of 1873-1896 in Central Europe*, 13 *Econ. Hist. Rev.* 58-73 (1943).

40. See generally H. Rosenberg, *supra* note 34.

recent research suggests that the situation was not as bad as it seemed to contemporaries.<sup>41</sup>

After the sharp decreases in production of the 1870s, the period was generally characterized in Austria by low prices, low profitability and slow production growth.<sup>42</sup> The persistence of low prices in relation to costs was thus the fundamental problem of business, and the intractability of the problem created a pervasive sense of malaise within the business community.<sup>43</sup>

Although the Austrian stock market crash represented the bursting of a speculative bubble, the long period of stagnation was the result of fundamental cyclical and structural problems.<sup>44</sup> Excess industrial capacity throughout Europe was a major culprit. The boom of the 1860s had generated heavy capital investment, particularly in new labor-saving technology, and production growth thus quickly outstripped demand and led to falling prices and low business profits. These problems in the industrial sector were accompanied by agricultural shortages, notably in 1875, that hit Austria particularly hard.<sup>45</sup>

As important as were the economic facts in conditioning thought about economic issues, the *interpretation* of those facts may have been more important. What people thought about *why* there was a depression profoundly influenced their perceptions of the economic process.<sup>46</sup> Here there was little ambiguity. Virtually everyone saw the economic misery as a failure of liberalism—proof that unrestrained competition was folly.

The “knowledge” that unlimited competition necessarily produced general welfare had permeated Austrian society in the 1860s, but by the late 1870s everyone “knew” that competition was a false god.<sup>47</sup> Following a “boom” that had been touted as proof of the benefits of unbridled competition, this experience was an extraordinary shock that exploded a dominant image of the economic process.

This interpretation of the economic facts penetrated all areas of

41. See D. Good, *supra* note 29, at 7-10. See also generally S. B. Saul, *The Myth of the Great Depression* (2d ed. 1985).

42. Recent scholarship has generated a controversy about the actual rate of production growth. For conflicting interpretations, see, e.g., D. Good, *Id.* at 170-6, and Komlos, Is the Depression in Austria after 1873 a “Myth”?, 31 *Econ. Hist. Rev.* 287 (1978).

43. See H. Matis, *supra* note 21, at 444.

44. See generally Matis and Bachinger, Österreichs Industrielle Entwicklung, in 1 *Die Habsburgermonarchie 1848-1918*, 105, 126-30 (A. Wandruszka and P. Urbanitsch eds. 1973).

45. The important agricultural depression of the late 1870s was precipitated by a sharp increase in United States wheat sales in Europe. See S. Pollard, *Peaceful Conquest: The Industrialization of Europe 1760-1890*, 254-70 (1981).

46. “The search for a determination of the causes of the ‘depression of business’ produced a voluminous literature which enriched the social sciences, found expression in poetry and fiction, and widened the domain of ‘crackpot’ writing.” Rosenberg, *supra* note 39, at 60.

47. See H. Matis, *supra* note 21, at 298-307.

society. Economists and other experts generally rejected "Manchesterism" as a flawed and naive doctrine that might work well in theory, but was of little value in practice,<sup>48</sup> and this perspective became dominant within the educated classes. This view also served the political goals of both Marxists and Christian Socialists, and it was thus also forcefully propagated among artisans and workers.

### 3. *The Advent of Organized Capitalism*

The perceived failure of liberalism and competition led to "organized capitalism."<sup>49</sup> Excessive competition was perceived as the enemy, and thus "freedom" and "autonomy" were replaced as watchwords by "collective action," "organization" and "stability."<sup>50</sup>

Businesses reacted to the depression by foregoing independence and seeking help from the government and cooperation from each other. The mid-century emphasis on freedom from governmental interference was replaced by calls for government to support struggling businesses. These supports included subsidies to failing business, increased financial support for workers in the form of social insurance and, above all, increased tariff protection against foreign competition. The traditions of Austrian mercantilism were given new impetus; government activity seemed to many to be the only way out of the economic doldrums.<sup>51</sup>

These governmental actions often fanned economic resentments. There was, for example, a widespread perception among national groups other than the Austro-Germans that economic policy was systematically used by the latter to their own advantage. Frequently cited were high tariffs, which favored producers over consumers, and thus, since the producers were virtually always Austro-Germans, increased the economic power of that class.

Competition law ideas were developed just as Austria was emerging from this "Great Depression." The problems, issues and perceptions

48. See generally Böhm-Bauwerk, 7 *Annals of Am. Acad. of Pol. and Soc. Sci.* 361,361-5 (1891) and H. Winkel, *Der Umschwung der wirtschaftlichen Auffassungen um die Mitte des 19. Jahrhunderts*, in 4 *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert* 3 (H. Coing and W. Wilhelm eds. 1979).

49. This term has been defined as "that form of economic order which said 'good-bye' to free competitive capitalism and represented a concentrated, internally bureaucratized economic system organized through business associations (*Verbände*) and secured by state interventions." Baltzarek, *Franz Klein als Wirtschafts- und Sozialpolitiker*, in *Franz Klein: Leben und Wirken* 173 (H. Hofmeister ed. 1988). For discussion of the intellectual origins of the concept, see Winkler, *Einleitende Bemerkungen zu Hilferdings Theorie des Organisierten Kapitalismus*, in *Organisierter Kapitalismus* 9-18 (H. Winkler ed. 1974). All translations are my own, except where otherwise indicated.

50. See H. Matis, *supra* note 21, at 367-413.

51. "Early on, before the market economy could really establish itself, the enterprises learned to act in a non-market-oriented way and in regard to all manner of problems to turn for help to the state." Koren, *Die Industrialisierung Österreichs - Vom Protektionismus zur Integration*, in 1 *Österreichs Wirtschaftsstruktur* 234 (W. Weber ed. 1961).

of that period thus dominated the experience of those who developed competition law ideas and supported competition law proposals.

#### D. The Political Predicament of Liberalism

The perceived failure of liberal economic policies combined with social and national divisions within Austrian society to create a highly explosive political situation. At mid-century the emperor and the aristocracy had still ruled Austria.<sup>52</sup> Their dominant concern was to avoid a recurrence of the Revolution of 1848 that threatened to topple them from power, and their chosen means were, for the most part, reactionary and repressive.<sup>53</sup> Liberalism's central goal of enhancing personal freedom was widely viewed as an ideology of resistance to this repression and aristocratic hegemony, and it enjoyed a large measure of support from most social classes.<sup>54</sup>

In 1860, Austria's humiliating military defeat by Prussia destroyed confidence in aristocratic leadership,<sup>55</sup> leading the emperor to create Austria's first parliamentary democracy and hand the reins of power to the liberals. As one observer has commented, "Not their own internal strength, but the defeats of the old order at the hands of foreign enemies brought the liberals to the helm of state."<sup>56</sup>

The economic boom that followed liberal ascendancy further increased popular support for liberal ideas.<sup>57</sup> The economic depression that commenced in 1873 quickly discredited these policies,<sup>58</sup> however, and the central political processes of the last decades of the nineteenth century can be seen as responses to the disillusionment and resentment directed at liberal policies.<sup>59</sup>

In 1879 the emperor replaced the liberals with a coalition of their opponents,<sup>60</sup> and they were never to regain control of the *Reichsrat*. Count Taaffe, the new prime minister, unified the major enemies of the liberals—including artisans, laborers and conservatives—in a so-called "Iron Ring" around liberal hopes, and this coalition remained in power until 1893.<sup>61</sup>

During the final two decades of the nineteenth century, three

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52. See generally A. May, *supra* note 6, at 27-8, and R. Kann, *supra* note 5, at 318-25.

53. R.J. Rath, *The Viennese Revolution of 1848* (1957).

54. A. Fuchs, *Geistige Strömungen in Österreich 1867-1918*, 6 (1949).

55. See generally A. May, *supra* note 6, at 46-7.

56. C. Schorske, *supra* note 3, at 5.

57. See *infra*, text accompanying notes 35-7.

58. For discussion, see *infra*, text accompanying notes 38-45.

59. See C. Schorske, *supra* note 3, at 5.

60. See W. Jenks, *supra* note 11, at 28-50.

61. For detailed discussion, see generally *Id.* at 11.

powerful social forces combined to doom the chances of the bourgeoisie in electoral politics and create a deep ambivalence toward liberal values that was reflected in Austrian competition law ideas. Democratization was the catalyst for this process. In 1882 the Taaffe government expanded the franchise to include many members of the lower middle classes.<sup>62</sup> In doing so he hoped to secure the allegiance of the new voters, but the principal effect of this tactic was greatly to accelerate the development of mass parties based on national and class antagonisms.

Industrialization was a second critically important force. In creating an industrial proletariat, particularly in Vienna, it provided the seedbed for Marxist parties, and these parties urged workers to view industrial leaders as their exploiters and thus their natural enemies. The Marxist-oriented Social Democratic party developed quickly beginning in the mid-1880s, and by the 1890s they had a significant voice in parliamentary politics. Moreover, that voice seemed certain to increase in power.

Finally, nationalism changed the face of the party system. Each national group had its own party or faction, whose sole and avowed aim was to obtain better treatment for that group. Since the Austro-German upper-middle class held much of the power, the objective of the non-German groups was to force the Austro-Germans to share their power and wealth. Naturally, German nationalists responded by forming their own parties whose chief aim was to protect those interests.

By the 1890s, the divisions within Austrian society had become often bitter and sometimes violent antagonisms, and the main target of resentment was the Austro-German upper-middle class. The non-German nationalities resented the Austro-Germans because of the dominance of the German cultural and economic elements; the lower classes resented them because of their economic and political power over those classes; and the upper class cared little for their interference in domains of Austrian life long reserved for the nobility. The large Jewish contingent in this group added a religious component to this resentment and provided a convenient object of scorn for those who felt aggrieved. Jewish dominance in banking created rancor among virtually all classes, and among the lower middle classes this combined with fear of competition from and exploitation by Jewish shopkeepers to create the virulent anti-semitism of the 1890s.

This hatred of the Austro-German upper middle class was important in the development of competition law ideas because of the close identification of that class with liberal values. This association was so close that the term "liberals" was generally used to refer to the entire class. The nomenclature is significant. Liberals constituted a social-political-economic class rather than a mere political orientation. As a consequence, liberalism—and, hence, values such as economic freedom—

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62. See A. May, *supra* note 6, at 196-7.

came to be seen by many as the source of all of society's ills. As Carl Schorske has put it,

The liberals had conjured up new forces and new claimants to political participation: Slavic nationalists, Socialists, Pan-German anti-semites, Christian Social anti-semites. They neither integrated these new movements into the legal order nor could they satisfy their demands. The conflicting groups may have had different heavens, but they shared the same hell: the rule of the Austro-German liberal middle class.<sup>63</sup>

Thus social, ethnic and religious resentments were transferred onto "liberalism," and "liberals" were held responsible for all forms of evil, not as a political group, but as a social class.

## II. Cartels: Promise and Problem

Austrian competition law ideas did not, however, develop in response to problems of competition in the abstract. They focused on a particular form of competitive restraint—cartels.

### A. Cartelization

Cartels developed in Austria in response to the economic depression of the 1870s that had discredited economic liberalism. They began to form in the late 1870s and continued to increase in number and in economic power through the first decade of the twentieth century.<sup>64</sup> Initially, they were formed in concentrated major industries such as coal and steel, but they gradually extended their reach throughout most areas of Austrian industry.

By the 1880s cartels had become dominant forces in the economy, controlling production and prices in key industries. As they grew in power, they also became increasingly aggressive, using their control over markets to induce membership and to secure compliance with cartel decisions and using their control over markets to raise prices to consumers and lower prices from suppliers.<sup>65</sup>

Cartel arrangements represented a means by which individual businesses could seek to counteract falling prices and excess capacity and thus avoid the effects of "too much" competition.<sup>66</sup> They provided a cooperative mechanism for stabilizing economic conditions in an

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63. C. Schorske, *supra* note 3, at 303.

64. See generally D. Good, *supra* note 29, at 218-26, and I. Berend and G. Ranki, *supra* note 19, at 156-62.

65. See generally H. Matis, *supra* note 21, at 370-1.

66. See generally Landes, *The Structure of Enterprise in the Nineteenth Century*, in *The Rise of Capitalism* 109-11 (D. Landes ed. 1966) and Schoenlank, *Die Kartelle: Beiträge zu einer Morphologie der Unternehmer Verbände*, 3 *Archiv für Soziale Gesetzgebung und Statistik* 492-4 (1890).

industry and increasing the profitability of its members, and they represented part of the sharp turn away from the market and toward "organized capitalism."

Banks operating in Austria provided an important impetus to the rapid development of cartels.<sup>67</sup> Often closely tied to major business corporations and industries such as sugar and iron and steel, banks frequently urged the formation of cartels in order to increase industry profitability and stability.<sup>68</sup> Cartelization reduced the likelihood of loan defaults by cartel members and enhanced the profitability and influence of the banks.<sup>69</sup>

A protective tariff policy also encouraged cartel development.<sup>70</sup> Especially after 1878, tariffs excluded all or most foreign competition on many domestic markets and thus allowed cartels to raise prices higher than otherwise would have been possible. This made cartel membership more attractive and increased the power of cartels vis-a-vis their members.

Finally, certain characteristics of the Austrian economy were conducive to cartel growth. For example, the purchasing power of most population groups within the empire was relatively low, making it difficult to achieve high margins on consumer goods, and thus Austrian cartels were often intended "to achieve the economies of specialization in a low-income market which were otherwise not possible."<sup>71</sup>

## B. Early Perceptions of Cartels

At first the public paid little attention to cartels. In part this was because Austrian cartels tended to be secretive. Under Austrian law, such arrangements did not represent valid and enforceable contracts,<sup>72</sup> and thus Austrian cartels generally avoided publicity. Even where there was knowledge of cartels, however, they were not viewed as a cause for concern. There was a widespread perception that cartels generally had beneficial effects on the economy. According to a contemporary expert,

Cartels descended almost like lightning from the no longer so bright heaven of belief in the 'free play of forces', the harmony of competition of liberal economics. They have perhaps more than any other of the new patterns that

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67. According to Gerschenkron, the cartels were "stepchildren" of the banks. A. Gerschenkron, *supra* note 32, at 15.

68. See R. Rudolph, *supra* note 30, at 104-6 and 165-74.

69. See I. Berend and G. Ranki, *supra* note 19, at 161-5 and Matis and Bachinger, *supra* note 44, at 137-41.

70. According to one expert, "The entire cartel structure...was closely tied to the system of tariff protection." R. Rudolph, *supra* note 30, at 166. See also generally Schoenlank, *supra* note 66, at 494-6.

71. A. Milward and S.B. Saul, *supra* note 27, at 322.

72. See *infra*, text accompanying notes 80-5.

sprang from economic liberalism contributed to giving a swift blow to the dogma of 'free competition', even by practitioners.<sup>73</sup>

They generally were viewed as "children of necessity" (*Kinder der Not*) that served to establish order and to avoid the chaos of ruinous competition.<sup>74</sup>

Cartels became a topic of academic discussion in 1883, when Friedrich Kleinwächter, an Austrian economist, published a book describing the sudden emergence of this new form of economic activity.<sup>75</sup> Although this work generated analysis and discussion of the causes and consequences of the cartel movement, there was no cry for government action to deal with cartels. They continued generally to be viewed as a natural and inevitable stage in the development of capitalism rather than a problem to be combatted.<sup>76</sup>

### C. The Demand for a Response

By the 1890s cartels were being viewed far more critically.<sup>77</sup> In part this change resulted from the conduct of the cartels themselves, as reports of harmful cartel conduct increased. Moreover, the growing size and power of cartels made them appear increasingly ominous, particularly in light of reports that they were also becoming increasingly aggressive.<sup>78</sup>

This fundamental shift in perspective was also brought about, however, by changing values and a changed political situation. One component of this shift was the growing intensity and breadth of resentment against liberals as a class. By the 1890s cartels had come to be seen by many as tools of the discredited Viennese liberals, and the antiliberal sentiment that penetrated much of society came to include and even focus on cartels. The bitterness and disappointment directed at liberals, in general, and bankers, industrialists and Jews, in particular, were now also directed at cartels.

New ideologies also cast cartels in a new light. During the late 1880s and 1890s new mass parties engendered and exploited populist sentiment against "big business," and cartels were a particularly convenient target of their attacks. The Social Democrats saw big business as responsible for exploitation of the laborers,<sup>79</sup> while the Christian

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73. Schäffle, *Zum Kartellwesen und Zur Kartellpolitik*, 54 *Zeitschrift für die gesamte Staatswissenschaft* 467 (1898).

74. See generally D. Good, *supra* note 29, at 235-7.

75. F. Kleinwächter, *Die Kartelle* (1883).

76. See, e.g., J. Grunzel, *Über Kartelle* 1-20 (1902).

77. See generally Schoenlank, *supra* note 66, at 489-91.

78. See, e.g., Wittelshöfer, *Der Österreichische Kartellgesetzentwurf*, 13 *Archiv für Soziale Gesetzgebung und Statistik* 122, 123 (1899).

79. For background, see D. Klink, *Vom Antikapitalismus zur Sozialistischen Marktwirtschaft* (1965).



Socialists inveighed against big industry and cartels for harming artisans and shopkeepers. Finally, the pan-Slavs viewed big business, including cartels, as a tool by which the Austro-Germans were exploiting the Slavic peoples.

All of this led to demands for cartel legislation from intellectual as well as political circles. Everyone recognized that cartels sometimes engaged in harmful conduct, but the real questions were whether anything could be done about cartels, and if so, how to go about it and how far to go.

#### D. The Legal Status of Cartels

The irony of demands for legal sanctions against cartels is that some sanctions already existed; they were merely ineffective. In the 1890s Austria was the only European country to have legislation that generally invalidated cartel agreements, and the relevant provisions of that legislation had been in effect for almost a century. This legislation served one of the functions of law—to identify unacceptable behavior, but it did not achieve another—to deter the proscribed conduct.

The Austrian provision invalidating cartel agreements was a reenactment of an 1803 statute intended to prevent merchants from profiting from shortages caused by the Napoleonic wars, particularly in necessities such as food. The original provision designated as a criminal offence agreements among members of a particular trade or business “to increase the price of a good without work and to the detriment of the public.”<sup>80</sup>

In 1870 this provision was transferred out of the criminal law and into a new statute (the *Koalitionsgesetz*) whose main objectives were to allow workers to form associations, but to restrict the activity of such associations by voiding agreements to strike.<sup>81</sup> Section 4 of this statute also invalidated “agreements between business people for the purpose of increasing the price of a good to the disadvantage of the public.” This provision seems to have been included in order to promote parallel treatment of employers and employees and thus to contribute to labor peace.<sup>82</sup> It was apparently something of an afterthought, and it was presented by the government as having little importance.<sup>83</sup>

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80. “The agreement of several or all of the business people in a particular business for the purpose of increasing the price of a good without work and to the disadvantage of the public, or to reduce such price for their own purposes, or to create shortages is to be punished as a serious criminal violation according to the degree of participation in same.” Justizgesetzsammlung Nr. 626. Cited in H. Schulte, *supra* note 1, at 32.

81. *Koalitionsgesetz* of April 17, 1870, Reichsgesetzblatt 1870, Nr. 3. For relevant portions of text, see Reichsamt des Innern, *Denkschrift über das Kartellwesen*, pt. IV, 59 (1908).

82. See generally J. Weidenholzer, *Der Sorgende Staat* 133-41 (1985).

83. See H. Schulte, *supra* note 1, at 40-3.

When modern industrial cartels developed in the 1870s, this statute proved to be of little value in combatting them, because it could be easily circumvented. The only mechanism for enforcing the statute was a civil suit by a cartel member, and, given the purpose of cartel agreements, such suits would always be rare. Moreover, even this possibility could be avoided by inserting an arbitration clause into the cartel agreement. The Austrian courts held that arbitrators were not required to apply the provision,<sup>84</sup> and thus the Coalition Statute did not provide an effective means of dealing with the cartel problem.<sup>85</sup>

### III. Emergence of the Administrative Law Solution

The perceived ineffectiveness of the existing private law mechanism demanded a more effective legal basis for responding to the cartel problem, and it was in the context of searching for such a solution that the basic intellectual framework for European competition law was developed.

#### A. Formulating the Solution

The outlines of a new solution were first articulated in 1894 at a conference of the highly influential *Verein für Sozialpolitik*, which viewed itself as the intellectual vanguard of economic and social policy.<sup>86</sup> Although primarily a German organization, it also included leading economists and policy analysts from other German-speaking countries and thus provided an important link between developments in Germany and Austria.

In the charged political situation of the 1890s, the *Verein* had chosen the legal treatment of cartels as a central topic of its biennial conference and asked Adolf Menzel, a highly-respected Austrian legal scholar, to be the principal speaker on the topic.<sup>87</sup> It was in this address that Menzel proposed a new solution to the problem of cartels. Thus, the European competition law model did not originate, as some have

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84. For discussion, see *Id.* at 43-5. This possibility was removed by a reform of the Code of Civil Procedure (ZPO) in 1895 that required arbitration panels to apply that provision.

85. In cases where the Coalition Statute did not apply, the Austrian Civil Code could also be used by a cartel member to invalidate a cartel. According to 879 of the Austrian Civil Code, a contract was invalid where it violated public policy ("*die guten Sitten*"), but this provision had little practical importance in relation to cartels. See *Id.* at 75-80.

86. See generally F. Boese, *Geschichte des Vereins für Sozialpolitik 1872-1932* (1939) and D. Lindenlaub, *Richtungskämpfe im Verein für Sozialpolitik* (2 vols. 1967). See also J. Schumpeter, *History of Economic Analysis* 803-5 (1954).

87. Menzel was a central figure in both private law and administrative law, and he was also particularly influential in the development of labor law during this period. See J. Weidenholzer, *supra* note 82, at 158.

supposed, as an unreflected and apolitical extension of bureaucratic jurisdiction. The ideas were generated by a leading scholar in a superior academic forum and in response to popular political pressures.<sup>88</sup>

For Menzel, the problem of cartels, and the justification for regulating them, was that they eliminated competition and could thus be used to increase prices and thereby harm society.<sup>89</sup> His analytical starting point is, therefore, consistent with modern competition law theory, both in Europe and in the U.S., which focuses on the economic harm caused by interference with economic processes.

In Menzel's view, however, some cartels could be economically justified. They could produce benefits that outweighed their potential harms. This point was not new; it represented the standard view of cartels in contemporary European economic thought.<sup>90</sup> Menzel entered new ground, however, when he argued that legislation was necessary that could prevent the harms caused by some cartels without interfering with the benefits produced by others.

Menzel thus considered legal scholarship essential to devising an effective response to the cartel problem. Economists and others could identify the problems, but the legal experts had to provide an intellectual framework for solving those problems.<sup>91</sup> He began by reviewing and evaluating the results of previous attempts—in Austria and elsewhere—to regulate cartels.<sup>92</sup> His central theme was that previous solutions to the problem had not worked and could not be expected to work and, consequently, that a new legal framework for cartels was necessary.<sup>93</sup>

According to Menzel, the criminal law was clearly inappropriate for use in regulating cartels.

Either the relevant criminal law provisions are very broadly drafted—i.e., directed against every business coalition (*Unternehmerkoalition*)—in which case they are unfair and practically unusable. Or only those coalitions directed at the exploitation of the public or monopolization of a particular branch will be subjected to penalties; then, however, it is extraordinarily difficult for the criminal judge, who is obviously somewhat further from economic life, to evaluate the economic justification of the organization.<sup>94</sup>

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88. It is important to remember that during this period leading bureaucrats and members of parliament often were also intellectuals. For discussion of the roles and status of "intellectuals" during this period and the lack of compartmentalization among intellectuals, see A. Janik and S. Toulmin, *supra* note 3, at 14-9, and W. Johnston, *supra* note 8, at 46-7.

89. Menzel, Referat über die wirtschaftlichen Kartelle und die Rechtsordnung, 61 *Schriften des Vereins für Socialpolitik* 23 (1895).

90. See, e.g., Herrmann, Die Haltung der Nationalökonomie zu den Kartellen bis 1914, in *Kartelle und Kartellgesetzgebung in Praxis und Rechtsprechung vom 19. Jahrhundert bis zur Gegenwart* 42 (H. Pohl ed. 1985).

91. See Menzel, *supra* note 89, at 23.

92. *Id.* at 32-43.

93. *Id.* at 43-5.

94. *Id.* at 44.

His review of attempts to apply criminal law to cartels led him to conclude that their practical significance was "extremely limited."<sup>95</sup>

He also found civil sanctions such as the invalidation of contracts to be of little value.<sup>96</sup> Such provisions could be useful only where a cartel member was willing to go to court against the cartel to avoid a contractual obligation, and this would rarely happen. Moreover, experience in Austria, France and elsewhere had shown that such provisions could almost always be avoided by organizational or contractual maneuvering.

Finally, he rejected what today might be called a "Chicago-school" response to the problem.<sup>97</sup> Some people believed that no legislation was needed, he reported, because free competition would itself prevent the cartel from significantly raising prices and would eventually lead to its collapse. "This view," he said, "requires no serious refutation; it has the facts against it."<sup>98</sup> Ironically, his example was the United States. "In North America, the land of the greatest economic freedom," he said, "whole branches of industry and commerce have been monopolized."<sup>99</sup>

He concluded, therefore, that an administrative solution was the only feasible response, because it provided a flexible mechanism for evaluating cartel behavior. His proposal for an administrative law solution did not, however, go into details. He stated only two requirements for an effective response to cartels. First, the state had to be able to acquire information about cartels.<sup>100</sup> In his view there was too little information about these powerful new organizations to even evaluate the need for controls on their activities. He proposed, therefore, that all enterprises entering into cartel agreements be required to register their agreements and to provide adequate information to administrators on request.

Menzel's second requirement was that all organized cartels—i.e., cartels that had some form of administrative machinery—be classified as public "associations" (*Vereine*) and be subject to a separate legal regime specifically for cartels—a set of norms and procedures specifically intended to regulate such behavior.<sup>101</sup> Each legal system would provide the substantive content for this legal regime according to its own needs and values. In Menzel's view this might mean that a state agency should have authority to invalidate particular acts of a cartel or even terminate its existence.

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95. *Id.* at 43.

96. *Id.* at 43-5.

97. For discussion, see Posner, *The Chicago School of Antitrust Analysis*, 127 *U. Pa. L. Rev.* 925 (1979).

98. Menzel, *supra* note 89, at 44.

99. *Id.* at 44.

100. *Id.* at 45-6.

101. *Id.* at 46.

## B. The Government's Proposal

Menzel's proposals led to intensive debate and controversy within political and intellectual groups, particularly in Vienna, and less than three years later the government proposed a competition statute based largely on those proposals. The government's proposal was immensely important for the development of competition law ideas, because it made them a major political issue and prevented their marginalization as a purely academic topic. Moreover, those proposals were detailed and accompanied by an "Official Explanation (*amtliche Begründung*)" that analyzed the problems at length and explained how the proposals would solve them.<sup>102</sup> The bill and the Official Explanation were obviously prepared with attention to high intellectual standards and thus provided a focus for discussion as well as a resource for later analysts and legislative draftsmen.<sup>103</sup>

### 1. Political Circumstances

The political circumstances in Austria in 1897 favored legislation to curtail the autonomy of cartels. The national government headed by Count Badeni was a weak coalition that could ill-afford to ignore the groundswell of sentiment against big business. Demands by national groups for greater autonomy were increasing in intensity, forcing the government to try to placate the most troublesome groups.<sup>104</sup> Moreover, the government was in financial straits and wanted to increase excise taxes, particularly on goods of cartelized industries, and this could be expected to heighten resentment among the lower classes against industry and to fuel the growing popularity of the Social Democratic and Christian Socialist parties.<sup>105</sup>

In the capital the political situation was even more precarious and dramatic. In the Viennese elections of 1895 the Christian Socialist party had mounted a virulent attack against big business, in general, and cartels, in particular, as exploiters of the people, and it even threatened

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102. The text of the proposed statute and its "Official Explanation" are reprinted in Reichsamt des Innern, *Denkschrift über das Kartellwesen*, pt. IV, 80-117 (1908)[hereinafter cited as Official Explanation].

103. According to an article in Vienna's leading newspaper on the day following first submission of the proposal to the *Reichsrat*, the Official Explanation was "prepared with exceptional knowledge of the issues, complete mastery of the relevant legislation and specialized literature." *Neue Freie Presse*, June 2, 1897, at 4, col.3. For a similar comment, see, e.g., Landesberger, *Der Österreichische Cartellgesetzentwurf*, 24 *Zeitschrift für das Privat-und Öffentliche Recht* 575,81 (1897).

104. See A. May, *supra* note 6, at 324-8.

105. For discussion, see Wittelshöfer, *supra* note 78, at 124. The author claims that such a proposal was important politically because the government was about to increase consumer taxes and thus had to try to reduce opposition to those tax increases by pressuring cartels in those industries not to further increase prices, or at least giving the appearance to trying to exert such pressure.

to municipalize major companies if it won the elections.<sup>106</sup> The rhetoric had been heard before, but its intensity had increased, and, even more important, the rhetoric for the first time had led to an electoral victory. In 1895 a Christian Socialist, Karl Lueger, won the mayoral election in Vienna, finally taking office in 1897.<sup>107</sup> Vienna had been "the [liberals'] political bastion, their economic capital, and the radiating center of their intellectual life,"<sup>108</sup> and now it too was lost.

## 2. *Analysis of the Problem*

The government's analysis of the cartel problem followed Menzel's, but was more detailed. According to the Official Explanation, the statute was intended to prevent competitors from agreeing to eliminate competition among themselves. Freedom of competition was its central objective.

The value of free competition was analyzed primarily in resource-allocation terms that have a decidedly modern ring. Focusing on the purchasing power of the consumer, the Official Explanation recognized that price increases attributable to the monopoly power of cartels represented a charge on the goods similar to that of a tax.

[The administration considers it its earnest duty] to take care that the ability of the populace to produce is not burdened above and beyond the necessary weight of taxes through private agreements whose objective is to saddle consumption with enforced restraints similar to indirect taxes.<sup>109</sup>

The essence of the problem was thus the forced transfer of wealth from consumers to cartel members.

This "tax" on consumers also had a fiscal impact. The government relied heavily on consumption taxes for revenues, and cartels reduced revenues from such taxes by increasing prices of the goods and thus reducing the ability of consumers to purchase them.<sup>110</sup> In effect, cartels not only transferred wealth from consumers to producers, but they also harmed government finances in the process.

In addition to this economic analysis, the government also saw two other major threats from cartels that related specifically to the Austrian political and social situation. The government claimed that cartels led to concentration of capital in the hands of the few and thus increased social equality and exacerbated social tensions.<sup>111</sup> Moreover,

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106. See A. May, *supra* note 6, at 310-2.

107. Although Lueger won four successive mayoral elections in the years 1895 through 1897, the emperor refused to confirm him as mayor until his fifth such victory in 1897. For discussion, see C. Schorske, *supra* note 3, at 144-5.

108. *Id.* at 24.

109. Official Explanation, *supra* note 102, at 67.

110. *Id.* at 66.

111. *Id.* at 69, 72.

cartels created an institutional framework for economic planning that could facilitate transition to a planned economy in the event of a socialist legislative victory.<sup>112</sup>

The Official Explanation recognized that all cartels had the potential for harm, but it accepted the proposition that some cartels brought economic benefits such as market stabilization that might justify their existence. The state's obligation was to identify the cartels that were, on balance, harmful and to protect the public against the harms they caused.

### 3. *Elements of the Solution*

The need to distinguish "good" from "bad" cartels was at the core of the analysis, and it conditioned the government's response to the cartel problem. The main characteristics of the proposed regulatory system were justified primarily by their appropriateness to that task.

The government proposed an essentially administrative solution to the cartel problem. It authorized an office within the finance ministry to secure, evaluate and publicize information about cartels and to regulate their conduct according to a general statutory standard.

A central task of this office was to gain and publicize information about cartels. According to the proposal, cartels would be required to have a detailed charter containing information such as the objectives of the cartel and the activities, characteristics, rights and duties of its members (§2). No cartel agreement would be valid unless such information was in writing, approved by a notary,<sup>113</sup> and reported to the finance ministry within eight days (§4). Particularly important decisions of the cartel, including, for example, those relating to the establishment of prices and production quotas were required to be reported within 24 hours. The material reported to the ministry was to be included in a cartel register that would be open for public inspection (§5).

The proposal also provided the finance ministry with broad authority to inspect books and documents of cartels and their members, and it provided powerful enforcement tools for coercing information from firms that were not inclined to provide such information (§7). Information acquired in such inspections was not, however, to be made available to the public.

The Official Explanation emphasized the government's belief that obtaining and publicizing extensive information about cartels would of itself solve many of the problems created by cartels, because it would induce cartels to avoid conduct perceived as harmful to society.<sup>114</sup> Thus

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112. *Id.* at 72.

113. This refers, of course, not to a U.S. notary public, but to a civil law notary, whose training and responsibilities often resemble those of a judge.

114. Official Explanation, *supra* note 102, at 78-9.

it was anticipated that the success of this information function would avoid the need for extensive regulatory action.

Where the threat of publicity did not deter harmful conduct, the proposal provided the ministry with significant authority to regulate cartel conduct. Despite the Official Explanation's discussion of several potential harms from cartels, the proposal contained a single substantive standard for the exercise of this authority. In section 8 it authorized the ministry to prohibit cartel decisions where they reasonably could be expected to "increase the price of a good or service to the disadvantage of the purchaser or decrease the price to the disadvantage of the seller, in a way which was not justified by the objective economic situation and obviously harmed designated tax revenues or the purchasing power or revenue-generating power of the population."<sup>115</sup> Where there was evidence that the cartel actually intended to achieve one of these prohibited objectives, the ministry could go so far as to terminate the cartel or prohibit any changes in the cartel agreement (§8).

The proposal provided for direct government intervention in economic decisionmaking, but such intervention was authorized only where the conduct norm of section 8 had been violated. The ministry could take action against a cartel only where the cartel used its economic power to increase its prices above a competitive level or coerce a reduction below such a level in prices charged to it. In the usual case of price increases, therefore, the ministry would have to determine that such an increase caused significant "disadvantage" to the buyer and that it was not "justified by the objective economic situation." The standard was far from precise, but it was conceived as objectively applicable. The ministry was not authorized to intervene on the basis of its own policy considerations, but the proposal did not provide for judicial review of administrative decisions.<sup>116</sup>

Sanctions imposed by the ministry were to be enforced through both civil and criminal law mechanisms. Where, for example, the ministry prohibited a cartel, the cartel contract was to be invalid in the civil courts. A knowing or grossly negligent violation of the ministry's order could lead to criminal prosecution.

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115. The central operative provision of section 8 reads as follows: "Das Finanzministerium kann die Ausführung der im letzten Absatze des §4 bezeichneten Cartellbeschlüsse untersagen, wenn sie geeignet sind, in einer durch die objective wirtschaftliche Sachlage des betreffenden Industriezweiges (namentlich durch die jeweilig für die Preisbildung und die Concurrenzverhältnisse oder sonst für die Conjunction massgebenden Umstände) nicht begründeten und das Erträgnis der im §1 begriffenen Abgaben oder die Steuer- oder Consumptionskraft der Bevölkerung offenbar schädigenden Weise die Preise einer Ware oder Leistung zum Nachtheile der Abnehmer oder Besteller zu steigern, oder zum Nachtheile der Erzeuger oder Leistenden herabzudrücken."

116. Before forbidding a cartel decision or terminating a cartel, the finance ministry was to secure the formal opinion (*Gutachten*) of a commission chaired by the finance minister (§11). This twelve-member commission was to be appointed by the finance minister and consist of six bureaucrats from outside the relevant tax office and six "experts (Fachmänner)."



Not all cartels were to be subject to this administrative authority, but only those that controlled the production of goods on which the government imposed excise taxes. This included items such as sugar, spirits, beer, mineral oil and salt. This limitation was viewed as a means of testing the regulatory scheme, and the government apparently intended to increase the scope of the regulation if it worked effectively.<sup>117</sup> By limiting the scope of regulation to this class of goods, the proposal also was consistent with its fiscal justification. Finally, this approach reduced the number of effected industries and thus the extent of political opposition.

### C. Responses to the Government's Proposals

The government submitted its cartel proposal to the legislature in June of 1897 and again—with minor revisions—in October, 1897, and March, 1898. Chaotic conditions in the legislature precluded, however, any serious consideration of the proposals. Mounting tensions among nationality groups broke into open conflict in 1896 when the Badeni government sought to allow increased official use of languages other than German.<sup>118</sup> The ensuing battles led to virtually complete disruption of the Austrian parliament, and it remained largely paralyzed by the disruptive tactics of one or another of the national groups or political parties for several years.<sup>119</sup>

Yet the parliamentary chaos did not prevent the government's proposal from becoming a focus of attention and debate. It was frequently discussed in the press, and many of the leading figures in the political and intellectual life of Vienna wrote books and articles responding to it.<sup>120</sup>

Virtually all commentators approved some aspects of the proposal. There was general agreement, for example, that the government should take some action with regard to cartels. Moreover, most agreed that

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117. H. Schulte, *supra* note 1, at 131.

118. See generally R. Kann, *supra* note 5, at 438-443.

119. In November, 1897 the emperor invoked a provision of the Austrian constitution that authorized the bureaucracy to govern in exceptional circumstances, and they did so for the next ten years, thus by-passing the legislature. W. Johnston, *supra* note 7, at 47.

120. In addition to Menzel, these included, e.g., Emil Steinbach, perhaps the most influential figure in Austrian law over the period from the 1870s until his death in 1907. He was appointed president of the Austrian Supreme Court in 1904. For background, see, e.g., J. Weidenholzer, *supra* note 82, at 184-9. Another such dominant figure was Franz Klein, who is perhaps the best-remembered scholar and bureaucrat of this period. He was twice minister of justice in the first two decades of the twentieth century and directed the revisions of Austrian civil procedure (1895-7) that were to have a far-reaching impact on European civil procedure. See Hofmeister, Franz Klein als Sozialpolitiker auf dem Gebiete des Privatrechts, in *Franz Klein: Leben und Wirken* (H. Hofmeister ed. 1988) and Hofmeister, Franz Klein (1854-1926), *Zur 130. Wiederkehr seines Geburtstages*, 1984 *Österreichische Richterzeitung* 200-3 (1984).

the response should be based on administrative rather than criminal or civil law.<sup>121</sup> In addition, while there were occasional arguments that the government should intervene only indirectly by reducing tariff protection in industries where cartels were causing harm, commentators generally agreed that the law should authorize direct government action to enforce the statutory norms.<sup>122</sup> Finally, virtually everyone supported measures to force cartels to disclose more information about their activities and to make much of this information available to the public.<sup>123</sup> The basic features of the government's response to the cartel problem were, therefore, widely accepted.

Criticism of the proposal generally reflected concern that it might encourage or at least permit government action that could harm or even destroy cartels. Industry was a predictable source of this criticism, but more important in the subsequent development of the ideas were other sources.

Social Democrats sought to protect the cartel movement from destruction because they saw it as a step on the path to socialism.<sup>124</sup> Cartels increased the planned component of the economy, and the Social Democrats believed that this would smooth the way for the introduction of a socialist planned economy. Moreover, they expected cartels to generate the need for a counterweight which would have to be socialist organized labor.<sup>125</sup> On the one hand, therefore, the socialists sought to prevent exploitation of the working classes by industry, but, on the other hand, they did not want cartel development halted or reversed.

An important group that may be called "social liberals" sought the same result, but for different reasons. Many leading bureaucrats and intellectuals respected liberal values, but insisted that capitalism be "socially responsible."<sup>126</sup> They tended to see cartels as an inevitable stage in the development of capitalism and valued the role of cartels in social stabilization. For them, interference with cartels would at best be futile, and it could disrupt economic and social development. Perhaps the most important proponent of this view was Franz Klein, a leading figure in Austrian law and politics in the decades around the turn of the century.<sup>127</sup> Although he agreed that government had to have more information about cartels and that in severe cases of exploitation the

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121. See generally Landesberger, *supra* note 103, at 579-80 and E. Steinbach, *Der Staat und die Moderne Privatmonopole* 37 (1903). But see Klein, *Die Kartellfrage: Rede in den Verhandlungen des Deutschen Juristentages*, Berlin 1902, in 1 F. Klein, *Reden, Vorträge, Aufsätze, Briefe* 229,33 (1927) and M. Hirschmann, *Kartelle und Staatsgewalt* 21-3 (1897).

122. For discussion, see E. Steinbach, *Id.* at 26-9 and 37-8.

123. See, e.g., *Neue Freie Presse*, Oct. 13, 1897, at 9, col.4, and 10, col.1.

124. See generally, M. Hirschmann, *supra* note 121, at 4.

125. *Id.* at 4.

126. See generally J. Weidenholzer, *supra* note 82, at 203-10.

127. For biographical information, see *supra* note 120.

government had to have some sanctions, he believed that any such sanctions should be through private law and very limited.

Economic thought provided the substrate for this positive evaluation of cartels by insisting that cartels were a necessary response to the industrialization process, one that avoided excessive competition and provided a nurturing framework for economic development. Gustav Schmoller, perhaps the foremost German economist of the period and the leader of the historical school of economics, argued that cartels provided a means of gradually adjusting to the rapid economic changes brought about by industrialization and thus reduced economic disruption and its concomitant social hardships.<sup>128</sup>

Many critics of the proposal believed that its central weakness was that it gave too much discretionary authority to a government ministry.<sup>129</sup> They feared that such discretion could lead to excessive governmental interference with cartels or to corruption of the administrators or both.

One solution that was offered to resolve this problem was a more precise statutory standard.<sup>130</sup> Proponents of this solution argued that the problem was the vagueness of the proposed administrative authorization. They perceived that in practice the existing language would place few real constraints on administrative discretion.

Others concluded that this problem could only be solved by locating administrative responsibility in an independent agency.<sup>131</sup> A frequent suggestion was that a cartel court be created to apply the law or at least review administrative decisions.<sup>132</sup> The problem, they argued, was not the vagueness of the proposed standard, but the location of power in an agency that was subject to political and economic pressures. Many argued, however, that such independence could never be achieved. For them the only solution to the problem of administrative power was to reduce the ministry's authority to intervene. Some critics noted that the social groups effected by the potential legislation were so powerful that, in practice, the bureaucrats would not be able significantly to influence their conduct.<sup>133</sup> As a result, they argued, significant regulatory authority would create new problems without having any realistic chance of achieving its stated goals.

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128. See, e.g., Schmoller, *Das Verhältnis der Kartelle zum Staate*, 116 *Schriften des Vereins für Socialpolitik* 237 (1906).

129. See, e.g., Liefmann, *Zur Frage eines Kartellgesetzes*, 10 *Soziale Praxis* 353,5 (1902) and Wittelshöfer, *supra* note 78, at 133.

130. See, e.g., Schoenlank, *supra* note 66, at 591-2.

131. See generally Landesberger, *supra* note 103, at 595-6 and E. Steinbach, *supra* note 121, at 41-3.

132. See E. Steinbach, *Id.* at 178.

133. See Wittelshöfer, *supra* note 78, at 134-5.

## D. Interpreting the Legislative Failure

Despite efforts in the following years to enact some version of the original competition law proposals,<sup>134</sup> such legislation was not enacted. Since, however, the failure to enact such legislation was largely attributable to the disintegration of the legislative process, the proposals were not seen as having been “defeated.” As one contemporary observer summarized the situation, “Their introduction [i.e., the competition law proposals] was followed by the period of severe crises which violently shook our national life and made the legislature unable to work for years. But strong impulses emanated from these proposals.”<sup>135</sup>

## IV. Shaping the Austrian Model

If we ask why this model of competition law was articulated in turn-of-the-century Austria, why it took the shape that it did and why these ideas found support and acceptance there, we find no simple causal relations, but we can identify at least some of the factors that influenced those developments.

### A. General Intellectual Climate

One reason that a new solution to the problem of economic competition was devised and welcomed was simply that many members of the Austrian educated class were looking for new solutions. Throughout Europe the 1890s were, as Eric Hobsbawm has written, a “time of new strategies.”<sup>136</sup> There was a willingness to break with the past, and this creative and experimental attitude was particularly apparent in Vienna.<sup>137</sup>

The Austrian intellectual and political situation in the 1890s was filled with conflicts and with fears of fundamental change. These tensions generated a search for new solutions to existing problems, while at the same time promoting a desire for stability and order. The Austrian competition law model embodied this tension. It boldly sought to use law in a new way to solve a pressing societal problem, but it also sought to avoid disruption of existing economic patterns.

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134. In 1899 the Industrial Council, the organization of chambers of commerce, formed a special committee to look into the problem, and in 1901 it presented a new draft for a cartel statute. This draft was based on the government proposals, but it reflected a significant weakening of the proposals. In 1900 the ministry of commerce engaged in extensive review of the possibility of such legislation and published a position paper recommending various measures to combat the “abuses” of cartels. Neither proposal became law. See generally Grossfeld, *supra* note 1, at 266-8.

135. Landesberger, *Welche Massregeln empfehlen sich für die rechtliche Behandlung der Industrie-Kartelle?*, 2 *Verhandlung des 26. Deutschen Juristentag* 366 (1902).

136. E. Hobsbawm, *The Age of Empire: 1875-1914* 99 (1989).

137. C. Schorske, *supra* note 3, at xvi-xvii.

## B. Liberal Ideals

This model for competition law was shaped by a unique interplay of Western European legal and economic thought with the traditions, interests and pressures of a central European political system being pushed toward rapid modernization and democratization.

The objective of the Austrian proposals was to protect economic competition, and this objective presupposed a high value on competition and economic freedom. The liberal tradition that was so deeply imbedded in the Austro-German upper middle class assured respect for these values.<sup>138</sup> Moreover, the growing isolation of this class in the 1890s may have encouraged its members to protect a cherished value in the face of increasing attacks.

Liberal economic values were also reemphasized during the 1880s and 1890s within the Austrian economics profession.<sup>139</sup> While economic thinking in Germany came to be dominated during this period by the so-called "historical school", which marginalized economic theory and paid relatively little attention to the importance of competition, the Austrian school of economics developed marginal utility theory and accented the value of competitive processes.<sup>140</sup>

Liberal ideals (supported by Jewish traditions) contributed another element essential to the genesis of competition law—a strong belief in the value and efficacy of legal institutions. The idea of creating a new kind of law to protect competition reflected enormous confidence in the legal process, for it involved using law in a new way to treat a complicated new social phenomenon. From this perspective Austrian competition law proposals offered the hope of a felicitous marriage between the two central values of nineteenth century liberalism—competition and law.

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138. "Right up to the very last days of the Empire, the majority of middle- and upper-middle-class Viennese professed to be 'liberals.'" A. Janik and S. Toulmin, *supra* note 3, at 53.

139. See generally, e.g., L. von Mises, *The Historical Setting of the Austrian School* (1969).

140. The so-called "Methodenstreit" between these two approaches to economics revolved around the extent to which science could establish general principles of economic behavior. Menger's Austrian school—reflecting Aristotelian influences—confidently asserted that such principles could be established, while Schmoller's historicists—revealing the impact of Hegelianism and German Romanticism—argued that each "Volk" had its own characteristics and operated according to its own internal dynamics, thereby precluding general, universally-valid principles of economic conduct. For discussion of the conflict, see, e.g., G. Ritzel, *Schmoller versus Menger: Eine Analyse des Methodenstreits im Hinblick auf den Historismus in der Nationalökonomie* (1951) and R. Hansen, *Der Methodenstreit zwischen Gustav Schmoller und Karl Menger - seine wissenschaftshistorische und wissenschaftstheoretische Bedeutung*, in *Beiträge zur Entwicklung der Wissenschaftstheorie im 19. Jahrhundert* 137 (A. Diemer ed. 1968).

Contrary to my expectations, I found little indication that the Austrian school of economics had any significant direct impact on the development of competition law ideas.

### C. The Impetus to Regulate

Without outside pressure, however, the liberals are unlikely to have produced a law that significantly expanded the state's authority to intervene in the economy—even in the name of protecting competition. For that, other values from other sources were needed.

One such source was a pervasive distrust of unrestrained competition. The experience of the two decades after the Great Crash of 1873 had convinced virtually everyone that too much economic freedom was likely to harm not only competition, but society as well. The depression seemed to have shown free competition to be a false god, and the suffering that followed seemed attributable to too much competition and too much freedom.

This distrust resonated with a powerful communitarian tradition. Austria's political and cultural traditions—not least, Roman Catholicism—long had emphasized the commonweal and the value of community.<sup>141</sup> Competition defied those values and was perceived by many as suspicious and alien. Moreover, these communitarian values urged that the powerful of the society be subject to communal concepts of justice and fairness and thus demanded that the community be protected from big business and powerful cartels. The long-standing invalidity of price manipulation agreements under Austrian law provided support for these communitarian claims.<sup>142</sup> While not an effective deterrent to cartel misconduct, the existing legal principles gave precedential weight to the idea that government should restrict economic freedom in order to protect society from its abuse.

The intense antagonisms of class, ideology and nationality that were rending Austrian society in the 1890s encouraged the regulation of cartels. Resentment against the Austro-German upper middle class—the liberals—urged controls on cartels, because cartels were an important power base of the liberal class. Moreover, economic freedom was the symbolic keystone of the liberal credo, and thus to restrict such freedom was to attack the power of liberal ideology.

These antagonisms also made symbols of unity particularly important for those in power.<sup>143</sup> Conservatives and liberals alike sought to demonstrate that they were promoting the interests of all classes and nationalities. Democratization and socialism pushed governing elites to try to maintain a sense of community, and competition law provided a useful symbol of cohesion. By proposing to subject cartels to the control of the state, the legislature was sending the message that powerful

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141. See, e.g., C. Schorske, *supra* note 3, at 65-72.

142. See *supra*, text accompanying notes 81-5.

143. Throughout Europe members of the intellectual and political elites were seeking such symbols of togetherness during this period. See E. Hobsbawm, *supra* note 136, at 107.

industries would not be allowed to exploit other classes. Moreover, Austro-German leaders thereby declared to other nationality groups that the government would prevent (Austro-German) industrial power from being abused to the disadvantage of Slavs and other minorities.

The most immediate and direct impetus to regulate came from the anti-business ideologies of the new political parties that were emerging in the 1890s. Their rhetoric drew on traditional communitarian values, but added appeals to resentment, fear of exploitation, and, often, anti-semitism. Social Democrats and Christian Socialists opposed big business because of its power to exploit, and competition law promised to limit the power of big business and thus its capacity to exploit.

Attempts to limit the power of cartels faced little political opposition. The political power base of business was in the Austro-German upper-middle class, but that group had lost much of its legislative power by the 1890s. Moreover, because Austrian industry generally sold primarily on the tariff-protected markets of the empire, its members could not successfully argue—as, for example, German cartels did—that cartel legislation would hurt their international competitiveness.

#### D. The Shape of Regulation

Many of the same factors that created the impetus to regulate also affected the shape of the proposed regulatory scheme. While much of this impetus came from opponents of cartels, the proposed regulation reflected a desire not to harm cartels and to be judicious in the use of state power against them. It reflected an understanding of the economy which saw benefit in a significant degree of coordination among competitors, while recognizing that such coordination necessarily created risks for economic conduct generally, particularly for the consumer.

The Austrian response to the cartel problem fused three basic elements. Liberalism provided the core value of maximizing the scope of freedom and competition in economic decision-making. The Austrian bureaucratic tradition contributed a conception of the state as neutral arbiter of conflicting interests and protector of the public good. And the constitutional ideal of the *Rechtsstaat* subjected the regulatory conduct of state officials to objective legal standards that were to prevent them from acting arbitrarily or seeking extrinsic personal or policy objectives.

The central substantive message of the proposal was that law should be used to restrain harmful uses of power by cartels. It thus reflected a compromise between the liberal value of economic freedom and the communal values of solidarity and protection against exploitation. It was designed to subject cartels to greater societal control, but to avoid harming them. It also reflected, however, a fundamental ambiguity of competition laws—that in the name of economic freedom they limit a firm's right voluntarily to relinquish its freedom.

The legislation was conceived as a general normative framework or “constitution (*Verfassung*)” for the operation of cartels. Its intellectual basis was an image of law as a positive means of establishing a balanced social order that would avoid abuses of power and the exploitation of the weak by the strong, an ordering notion that also was evident in other Austrian legislation of the period such as labor law.<sup>144</sup>

Publicity was one important means of achieving this result. Economic actors were presumed to be concerned about community values and social pressures, and the competition law proposal reflected the conviction that they would voluntarily avoid conduct inconsistent with community concepts of justice, at least where they knew that their conduct would become widely known.

The idea that the role of competition law was to provide a general normative framework meant that the controls had to be flexible, leaving significant *ad hoc* discretion to the decisionmakers. It implied that the legislature could not “know” in advance whether particular conduct should be prohibited, and it thus required an examination of the economic circumstances of the case. In the intellectual atmosphere created by the protracted debate concerning the nature of economic knowledge between the Austrian and German schools of economic thought, there was little willingness to suppose that the legislature could know enough to prescribe more specific rules.<sup>145</sup> Such flexibility was also consistent with the late nineteenth emphasis in Austria on the historicity of legal decisions—i.e., the perceived need to examine the specifics of any situation in its concrete historical setting before reaching judgment.<sup>146</sup> Finally, it reflected contemporary skepticism regarding deductive reasoning.<sup>147</sup>

This conception of the objectives of competition law and its preferred mode of operation foreclosed the use of the regular courts and required a bureaucratic solution.<sup>148</sup> If the decisionmaker was to

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144. See generally, e.g., Hofmeister, *Die Rolle der Sozialpartnerschaft in der Entwicklung der Sozialversicherung*, in *Historische Wurzel der Sozialen Partnerschaft* 278, 291-309 (G. Stourzh and M. Grandner eds. 1986) and J. Weidenholzer, *supra* note 82, at 179-218.

145. See *supra*, text accompanying note 140.

146. The historical school of German legal scholarship had a significant impact in Austria during this period. See generally Lentze, *Austrian Law Schools and Legal History, Essays in Honor of Felix Frankfurter* 159, 169-74 (M. Farkosch ed. 1966) and Ogris, *Die Historische Schule der Osterreichischen Zivilistik*, in *Festschrift für Hans Lentze* 449, 494-5 (1969). For an insightful recent discussion of nineteenth century German legal science that discusses these issues, see Reimann, *Nineteenth Century German Legal Science*, 31 *Bost. Coll. L. Rev.* 827 (1990).

147. As Carl Schorske describes so well, there was a pervasive sense of distrust of concepts and of language in the 1890s in Vienna, and this also may have influenced the *ad hoc* character of the legislation. See C. Schorske, *supra* note 3, at 19-20. See also A. Janik and S. Toulmin, *supra* note 3, at 65-91.

148. Civil and criminal law had very well-defined functions. Civil law was to regulate the relationships among persons, and criminal law was to punish those who harmed others. These conceptions could not easily accommodate the idea of protecting a *process*.



be flexible, and if publicity was to be an important means of securing compliance, administrative processes seemed the most likely mechanism for achieving competition law objectives.

Austrian traditions favoring administrative solutions also tended to generate objectives that were appropriate for such solutions. The tradition of bureaucratic centralism established in the eighteenth century supported a powerful bureaucratic apparatus with wide-ranging prerogatives.<sup>149</sup> According to this tradition, the state bureaucracy was responsible for improving society. The values of personal freedom and responsibility that had become imbedded in Western Europe by the late 1800s had a more tenuous hold in Austria. The state bureaucrats would watch out for the welfare of society; individual freedom did not provide the answers to most problems.

This confidence in an educated and enlightened bureaucracy remained powerful throughout the nineteenth century. For many, confidence in the bureaucracy may even have increased during the late nineteenth century, because the bureaucracy alone provided a sense of stability and order and thus a basis for believing that workable solutions to society's problems actually might be found.

Confidence in the bureaucracy was also nurtured by political imagery that portrayed the bureaucracy as a neutral arbiter of conflicting interests within society. Professor Lorenz von Stein, professor of political science (*Staatswissenschaft*) in Vienna from 1855-1888, was a particularly influential proponent of this view, and it had an exceptional impact, particularly within the educated middle class.<sup>150</sup> Stein was a dominant intellectual figure in Vienna and inculcated his views in many of the upper echelon bureaucrats of the 1880s and 1890s. His conception of the role of the bureaucracy also increased the self-confidence and sense of mission of that bureaucracy.

The competition law proposal was consistent with von Stein's conception of the role of the bureaucracy. It posited a conflict between the economic interests of the cartels and their members, on the one hand, and the welfare of society, particularly consumers, on the other hand. It then provided a broad legal framework within which cartels would have to operate and authorized the bureaucracy to gather and publicize information about cartels and mediate conflicts arising from potentially harmful cartel conduct.

The proposal was also molded by an important negative influence—United States antitrust law. U.S. experience was widely-discussed during

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149. See generally R. Kann, *A Study in Austrian Intellectual History* 12-145 (1960); G. Franz, *supra* note 16, at 11-17; and W. Johnston, *supra* note 8, at 15-18.

150. See J. Weidenholzer, *supra* note 82, at 158-63. See also Schmid, *Über die Bedeutung der Verwaltungslehre als selbständiger Wissenschaft*, 65 *Zeitschrift für die gesamte Staatswissenschaft* 193 (1909) and Inama-Sternegg, *Die Entwicklung der Verwaltungslehre und des Verwaltungsrechts seit dem Tode von Lorenz von Stein*, 11 *Zeitschrift für Volkswirtschaft, Socialpolitik und Verwaltung* 10 (1902).

the Austrian debates, but the Austrians rejected United States law as a model.<sup>151</sup> In particular, the lack of flexibility and cumbersomeness of the U.S. treatment of cartels as well as its reliance on the regular court system were thought to have encouraged the formation of trusts and thus to have increased economic concentration. The Austrians feared such concentration far more than cartels.<sup>152</sup>

The configuration of power within Austrian society also contributed to shaping the proposed competition law. The Austro-German middle class continued to dominate intellectual life and the all-important bureaucracy, and its representatives continued to respect liberal values such as economic freedom and competition. This group thus sought a bureaucratic solution which was based on law, but in which its own members had most of the real power.

Above all, they sought to preclude influence from the legislature.<sup>153</sup> The socialist, anti-liberal and anti-big business attacks that were reaching crescendo proportions in the mid-1890s created concern within the liberal middle class that such groups might soon take over the legislature and initiate fundamental changes in Austrian society that would reduce the power of the liberals. By establishing a system based on administrative decisionmaking, the liberals could at least forestall the potential harm to their interests that such political changes seemed likely to produce.<sup>154</sup>

## V. The Austrian Legacy

Little attention has been paid to the influence of Austrian ideas on the development of competition law in Europe, because it was indirect.<sup>155</sup> Given the political turmoil of the final decades of the Habsburg empire and the radical changes in Austria after World War I, the ideas developed in *fin-de-siècle* Austria easily could have been forgotten—if they had not influenced Germany.

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151. See, e.g., Landesberger, *supra* note 103, at 578.

152. See, e.g., E. Steinbach, *supra* note 121, at 31-4. For discussion of the role of U.S. antitrust in the early debates in Germany and Austria, see F. Blaich, Die Rolle der Amerikanischen Antitrustgesetzgebung in der Wirtschaftspolitischen Diskussion Deutschlands Zwischen 1890 und 1914, 22 *ORDO* 229 (1971).

153. It is important to remember that leading intellectuals of the upper middle class were often also high-ranking bureaucrats. Many leading law and economics professors took top posts in the bureaucracy. Class interests created incentives for them to support economic and legal theories that would allow decisions to be made by members of that class, and the bureaucracy provided the context for such decisionmaking. For discussion of such career patterns, see, e.g., W. Johnston, *supra* note 8, at 76-87.

154. Fear of the legislature was enhanced by the legal positivism of Austrian law that, at least in theory, required the judge to apply statutes as written, and thus provided little opportunity for judges to deviate from legislative enactments. See generally H. Baltl, *Österreichs Rechtsgeschichte* 259-306 (1986).

155. For important exceptions, see *supra* note 1.

At least in part as a result of impulses from Austria, competition legislation became an important issue in Germany in the late 1890s and early 1900s.<sup>156</sup> The possibility of such legislation was discussed at length in parliament and in academic circles, and there was a major governmental investigation of the issue from 1902 through 1905.<sup>157</sup> The Austrian proposals and experience were highly influential during these parliamentary and scholarly debates.<sup>158</sup> Austrian experts such as Franz Klein were central figures in the controversy, and there were frequent references to the Austrian proposals and literature.

Although the political circumstances of pre-war Germany precluded the passage of competition legislation, the situation changed dramatically after World War I. In response to inflation and concerns about economic power, Germany enacted Europe's first competition legislation in 1923.<sup>159</sup> In doing so, it relied heavily on the Austrian-influenced proposals and debates of two decades earlier.

The basic ideas of this model gained widespread acceptance among scholars and government officials throughout Europe during the 1920s,<sup>160</sup> and after the Second World War they were incorporated into law in many European countries.<sup>161</sup> Although some countries such as France and Italy continued until recently to pay little attention to the need to protect the competitive process,<sup>162</sup> the basic elements of the model first articulated in Austria now pervade most European national legal systems, and they have infused the competition law of the European Communities.

This tradition has created a common perception of the goals of competition law that sees it as a necessary corrective for defects in the capitalist system. Given that business firms often relinquish their freedom in order to create economic power and increase profits, competition law is necessary to prevent the potential harms that can result from abuses of such economic power.

This conception of the role of competition law emanated from a critical examination of the capitalist system by an educated class steeped

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156. See generally F. Blaich, *Kartell und Monopolpolitik im Kaiserlichen Deutschland* (1973).

157. For detailed discussion, see Grossfeld, *supra* note 1, at 269-79.

158. See generally *Id.* at 268-9 and A. Wolfers, *Das Kartellproblem im Lichte der deutschen Kartellliteratur* 125 (1931).

159. Verordnung gegen Missbrauch wirtschaftlicher Machtstellungen, 1923 *Reichsgesetzblatt* [RGBl.] 1067 (Ger.). An English translation appears in R. Leifmann, *Cartels, Concerns and Trusts* 351-7 (1932).

160. See Gerber, Law and the Abuse of Economic Power in Europe, 62 *Tul. L. Rev.* 58,62-6 (1987).

161. Thorelli, Antitrust in Europe: National Laws after 1945, 26 *U. Chi. L. Rev.* 222 (1959).

162. See, e.g., R. Plaisant, and P. Roseren, France, in *The World Law of Competition* (J. von Kalinowski ed. 1987) and V. Donativi, *Introduzione della disciplina Antitrust nel sistema legislativo italiano* (1990).

in humanist traditions and classical learning. It gained and maintained influence, because it tied the specific problem of regulating cartels to the general problem of regulating competition and to fundamental issues of the nature of capitalist society.

The Austrian proposals and debates provided not only a framework for analysis of the problem of economic competition, but also a model for responding to that problem. The starting point of this response has been the belief that the objective of protecting competition has little to do with the traditional goals and methods of civil and criminal law. It thus requires a legal regime specifically adapted to achieving that objective. This has precluded reliance on the procedures of the ordinary courts and required a fundamentally different procedural framework for competition law. This view of competition law contrasts sharply with the tendency in U.S. antitrust law to employ the existing conceptual and procedural molds of criminal and civil law to deal with competition law issues.<sup>163</sup>

The European competition law tradition relies instead on administrative processes to apply and enforce competition laws. Virtually every European competition law system relies primarily on administrative decisionmaking and enforcement, leaving little, if any, room for the operation of the regular courts. This reliance on administrative processes influences many other aspects of the system, such as, for example, the types of norms that are created and the factors that influence their application.

A related component of the tradition has been the belief that the dissemination of knowledge about violations of competition law norms normally will be an effective deterrent to such violations. This essentially communitarian perspective is based on the assumption that businesses seldom will engage in practices known to be harmful to society, at least where information concerning such conduct would become widely known.

Finally, this tradition has emphasized the substantive concept of abuse of power. Although the term "abuse" did not crystallize as a common description for this standard until the 1920s, the central provision of the proposed Austrian legislation sought to limit "unjustified" uses of power, and this concept continues to play a significant, often dominant, role in virtually all European competition law systems.

Despite the continuing force of these basic ideas and institutional patterns, some competition law systems have deviated significantly from the Austrian model. In some national competition law systems that emerged after World War II, for example, the abuse concept was

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163. The Department of Justice can enforce the antitrust laws, for example, only by prosecuting a criminal or civil suit in the ordinary courts. *See generally* A.D. Neale and D.G. Goyder, *The Antitrust Laws of the United States* 372-82 (3d ed. 1980).

transformed from a legal standard into a policy tool. Whereas the Austrian model insisted on the objective applicability of the statutory standard, countries such as the United Kingdom largely abandoned this element, authorizing administrators to act "in the public interest," at least in some contexts.<sup>164</sup> In contrast, some competition laws, notably those of Germany and of the European Economic Community, have increased their reliance on judicial processes. They have abandoned the abuse concept as the substantive standard in areas such as competitor collaboration, replacing it with a prohibition on such conduct, and they have subjected administrative action to review by the regular courts.<sup>165</sup> Such changes have not, however, obscured the similarities in basic characteristics among European competition law systems.

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The competition law ideas developed in Austria at the turn of the twentieth century provided the seeds for the development of the European competition law tradition, and they thus have profoundly influenced subsequent legal and economic developments throughout Europe. These ideas have remained powerful because they have corresponded to values, expectations and perceived needs of lawyers, politicians and the public.

The Austrian model of competition law was a response to industrialization, democratization and their concomitant social transformations. In turn-of-the-century Austria these processes were moving forward at speeds unknown elsewhere in Europe, and the rapidity of change intensified awareness of both their benefits and their harms. Trained in classical scholarship and humanistic values, but frequently also immersed in the practical problems of industrialization and democratization, the elite that crafted this response was unusually sensitive to both the values that were being lost and those that were replacing them.

As a result, competition law ideas reflected what they sought to preserve from the past as well as their visions of the future. Economic competition was valued, but subject to considerations of community welfare; administrative decisionmaking was considered necessary to deal with the conflicts arising from competing private and public goals; and the respect for law and its mechanisms was sufficiently broad and deep to create confidence that neither businesses nor bureaucrats would lightly flout community norms. European competition laws continue to be based on this constellation of insights and values.

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164. See generally, e.g., V. Korah, *Competition Law of Britain and the Common Market* 93-182 (3d ed. 1982).

165. For Germany, see generally J. Maxeiner, *Policy and Methods in German and American Antitrust Law* (1986); for European Communities competition law, see C.W. Bellamy and G.D. Child, *Common Market Law of Competition* (3d ed. 1987).